

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

CONCO QUARRIES, INC. Employer, and HEAVY CONSTRUCTION LABORERS' LOCAL #663 Petitioner.	Case No.: 14-RC-267769 <u>E-Filed</u>
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APPENDIX TO EMPLOYER'S REQUEST FOR REVIEW OF THE ACTING
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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Attorney for Employer

January 19, 2021

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ATTACHMENT

1

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.
14-RC-267769

Date Filed
October 20, 2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer

Conco Companies

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)

431 South Jefferson Suite 250
MO Springfield 65806-

3a. Employer Representative - Name and Title

Andrew Baird

3b. Address (If same as 2b - state same)

431 South Jefferson Suite 250
MO Springfield 65806-

3c. Tel. No.

(417) 831-7622

3d. Cell No.

3e. Fax No.

(417) 831-7236

3f. E-Mail Address

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Construction - Raw Materials

4b. Principal product or service

Construction aggregate.

5a. City and State where unit is located:

Springfield, MO

5b. Description of Unit Involved

Included: See Attached Page 2 for additional details

Excluded: See Attached Page 2 for additional details

6a. No. of Employees in Unit:

6

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☐ 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (If no reply received, so state).

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel No.

8d Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? _____ If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: ☐ Manual ☒ Mail ☐ Mixed Manual/Mail

11b. Election Date(s):
10/29/2020

11c. Election Time(s):
12:30 p.m.

11d. Election Location(s):
Fair Play Quarry.

12a. Full Name of Petitioner (including local name and number)

Jason Payne Mendenhall
Heavy Construction Laborers' Local #663

12b. Address (street and number, city, state, and ZIP code)
7820 Prospect Avenue
MO Kansas City 64132-

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
Laborers' International Union of North America

12d. Tel No.

(816) 444-0062

12e. Cell No.

(816) 985-1890

12f. Fax No.

(816) 822-9906

12g. E-Mail Address

jmendenhall@lu663.com

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Ryan D Smith Attorney.
Arnold, Newbold, Sollars, and Hollins

13b. Address (street and number, city, state, and ZIP code)

1100 Main Street Suite 2001
MO Kansas City 64105-

13c. Tel No.

(816) 421-5788

13d. Cell No.

13e. Fax No.

(816) 471-5574

13f. E-Mail Address

rdsmith@a-nlaw.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Jason Payne Mendenhall

Signature

Jason Payne Mendenhall

Title

President and Business Manager

Date

10/15/2020 16:20:40

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

Employees Included

All employees engaged in hauling, crushing, processing, loading, of aggregate at the Marshfield and Fair Play quarries, as well as all employees engaged in maintenance of both quarries.

Employees Excluded

Managerial, clerical, and security personnel.

ATTACHMENT

2



Ada

Conco Quarries - Montevallo

Conco Quarries - Stockton

Conco Quarries - Bolivar

Conco Quarries - Fair Play

Conco Quarries - Buffalo

Sebanon

Conco Quarries - Fair Grove

Conco Quarries - Marshfield/Conway

Carthage

Springfield

Google Earth

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NLRB Case No. 17-RC-267769 Employer: Conco Quarries, Inc. Petitioner: Heavy Construction Laborers Local #663 11/16/20 Representation Case Hearing	Employer Exhibit 4
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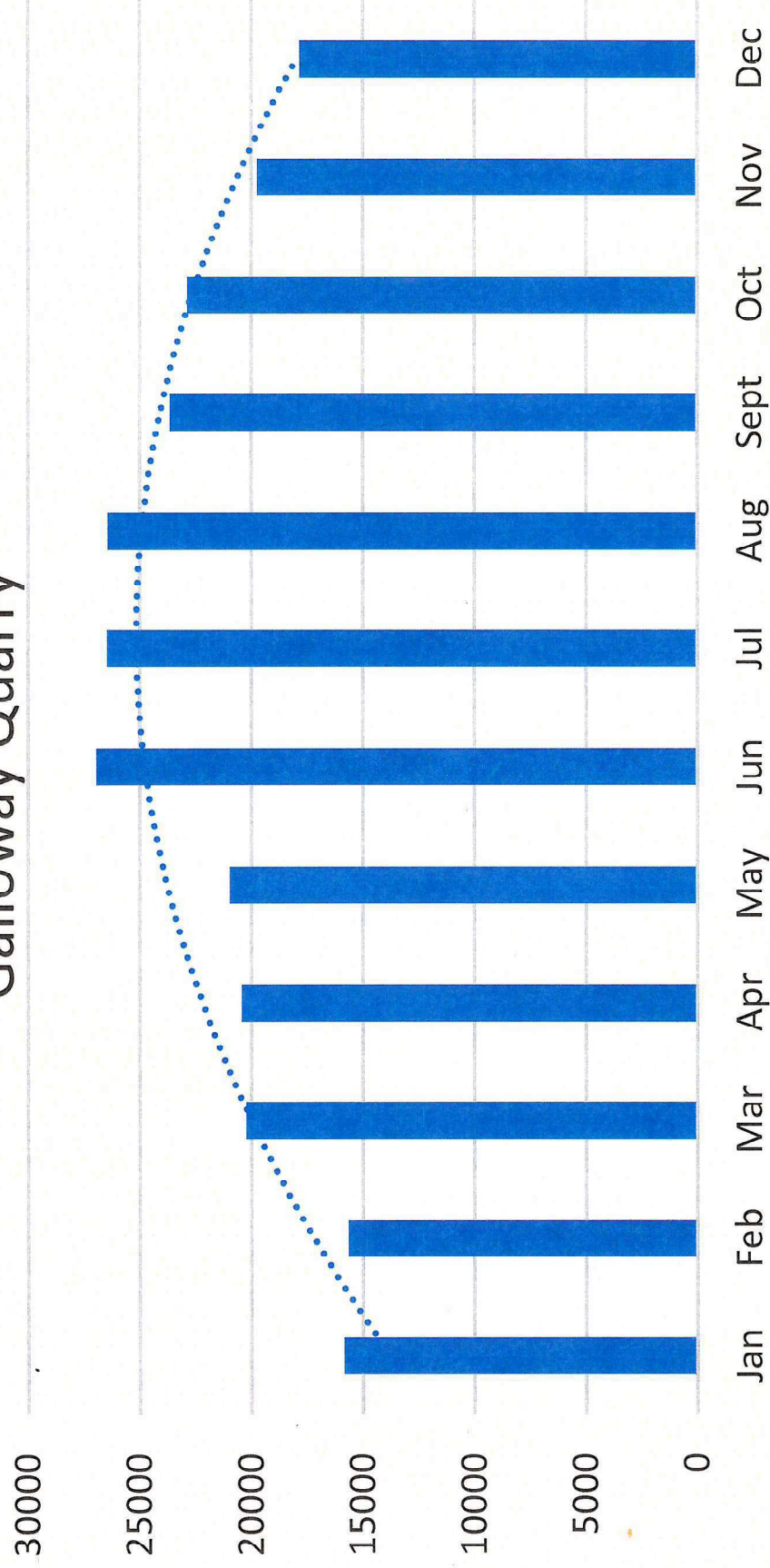
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graph TD
    JW["Jenna Wundrack - Mining Engineer"] --- CU["Chris Upp - VP/General Manager"]
    CU --- AB["Andrew Baird - President"]
    CU --- JG["Jacd Gamble - Asst. GM"]
  
```

NLRB Case No. 17-RC-267769 Employer: Conco Quarries, Inc. Petitioner: Heavy Construction Laborers Local #663 11/16/20 Representation Case Hearing	Employer Exhibit 5
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10 Year Average Galloway Quarry



ATTACHMENT

3

OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

Case Nos. 14-RC-267769

CONCO QUARRIES, INC.,

Employer,

and

HEAVY CONSTRUCTION LABORERS' LOCAL #663, affiliated with
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,

Petitioner.

Place: Zoom

Date: November 16, 2020

Pages: 1 through 222

Volume: 1 of 1

OFFICIAL REPORTERS

ARS REPORTING
22052 West 66th Street, Suite 314
Shawnee, Kansas 66226
(913) 422-5198

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

In the Matter of:

CONCO QUARRIES, INC.,

Employer,

and

Case No. 14-RC-267769

HEAVY CONSTRUCTION LABORERS'
LOCAL NO. 663, Affiliated with
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA,

Petitioner.

The above-titled matter came on for hearing, via video conference, pursuant to Notice, before **MELISSA C. NISLY, Hearing Officer**, of the National Labor Relations Board, on Monday, November the 16th, 2020, at 9:57 a.m.

1 (Whereupon,

2

CHRIS UPP

3 having been sworn/affirmed, was called as a witness
4 herein, and was examined and testified via video-
5 conference, as follows:)

6 HEARING OFFICER NISLY: Thank you.

7

DIRECT EXAMINATION

8 Q BY MR. KING: Please tell us your full name, and
9 spell it for the record.

10 A Chris, C-h-r-i-s, Upp, U-p-p.

11 Q And what is your current position with the Company?

12 A Vice-President and General Manager.

13 HEARING OFFICER NISLY: Mr. King, I am having a
14 little trouble hearing you, so can you move closer --

15 MR. KING: I will just come right up here.

16 THE WITNESS: Okay.

17

[Long pause]

18 MR. KING: Okay, how is that?

19 HEARING OFFICER NISLY: That is much better. Thank
20 you.

21 Q BY MR. KING: I think we were asking the position,
22 what is the current position you held. I think you
23 answered that.

24 How long have you worked for the Company?

25 A 26 years.

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1 Q And just a little background of what you have done
2 before coming to this employer.

3 A I actually interned two summers while going to
4 college and started full-time as a Project Engineer at the
5 Willard Quarry. I started managing people in 2001 at our
6 Galloway Quarry -- at our predecessor, and then in my
7 current positions for the last thirteen years.

8 Q I am going to have you reference Employer's Exhibit
9 1.

10 **(Employer's Exhibit No. 1, marked for identification.)**

11 Q BY MR. KING: Please identify what that is printed
12 off?

13 A Yes, this is from the Secretary of State from
14 Missouri, Employer Registration for Conco Quarries,
15 Incorporated.

16 Q And that is the correct employer name, Conco
17 Quarries, Incorporated, spelled out?

18 A Yes, it is.

19 Q And it says that it has been in existence and was
20 registered in 1963?

21 A That is correct.

22 MR. KING: I would like to introduce Employer's
23 Exhibit 1 into the record.

24 MR. SMITH: No objection.

25 MR. KING: Objection or no objection? I didn't hear

1 center point. Actually, if you look closely, you can see
2 a bright white area, that is actually the quarry. You can
3 see it from the aerial view.

4 Q That is the bright white dots that are about an inch
5 away?

6 A Yes, to the northwest.

7 MR. KING: I would like to introduce Employer's
8 Exhibit 4 into the record.

9 MR. SMITH: No objection.

10 HEARING OFFICER NISLY: The exhibit is received.

11 **(Employer's Exhibit No. 4, received into evidence.)**

12 MR. KING: As far as doing the math, just as an aid
13 to the Hearing Officer, so to speak, the distance is,
14 looking at Employer's Exhibit 4, from Marshfield, as far
15 as the other Rural Quarries, Bolivar is 35.45 miles,
16 Buffalo is 16.36 miles, Fair Grove is 15.0 miles, Fair
17 Play is 38.18 miles, Montevallo is 73.64 miles, Pittsburg
18 is 36.45 miles, Stockton is 56.59 miles; all of those from
19 the Marshfield petitioned-for quarry.

20 Again, as an aid to the record, Madam Hearing
21 Officer, the distance from the Fair Grove, also
22 petitioned-for quarry, are the following: Bolivar is
23 23.18, Buffalo is 16.36, Fair Play 24.55, Marshfield, of
24 course, 15.0, Montevallo is 16, Pittsburg is 29.32, and
25 Stockton, 43.64.

1 of that. The Teamsters basically take care of the truck
2 driving, so the Haul Truck Driver and Stockpile Truck
3 Driver, and then our Laborers are basically our
4 Maintenance people, and also our Drillers is a Laborer.

5 Q Thank you. Referencing Employer's Exhibit 5, I don't
6 think we need to go into any of these various
7 classification, and the document will speak for itself as
8 far as the Pit Supervisor, the Plant Supervisor, and the
9 other thing that is obvious, the "pit" is what I would
10 call, layman, a quarry, and the "plant" is what is doing
11 the crushing and stuff.

12 A That's correct.

13 Q Okay, let's move to the right, and -- okay, Galloway,
14 which is all represented by one union, the Boilermakers.

15 We don't have to go into super detail, but you have
16 Willard, which is big -- in relation to Willard, how big
17 is Galloway?

18 A Okay, Galloway is about a third of the size of
19 Willard.

20 Q Okay. Just walk us through. Same process, or --

21 A Same -- same process. The drilling is done by a
22 third-party contractor. The blasting is also done by a
23 third-party contractor. We do our own stripping, and then
24 everything else is virtually the same.

25 Q Okay. Referencing Employer's Exhibit 5, I am going

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1 February, March, it was still considered wintertime in our
2 business. We didn't have the need for the Quarry Crew
3 yet.

4 Q And let's back up a little bit. This -- let's take
5 some industry information.

6 You obviously have a very long history in the
7 industry, going back -- back to when the -- so to speak,
8 and maybe it is different for Willard and maybe it is
9 different for Galloway. In your experience, what is the
10 season, if there is one, what is the ebb and flow -- let's
11 just take Willard, for example?

12 A Sure. Willard -- Willard is a little unique in that
13 we supply concrete materials to concrete plants in and
14 around. It is a more specialized aggregate, whereas a lot
15 of the Rural Quarries, and the Galloway Quarry, to some
16 extent, is more construction driven, meaning that as
17 construction needs ramp up and ramp down, based on the
18 time of the year, that is how the production -- the
19 production in those operations goes.

20 If you look at overall construction, typically it
21 slows down in the winter months, typically in December
22 through April, so -- so those months, the demand is not
23 there, so to cost considerations, we don't run at the same
24 level in those four or five months, that we do the rest of
25 the year. It is just not cost-effective to build up a lot

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1 started getting to where we would start running out of
2 products, then it was decided, "All right, we need to go
3 ahead and go through and figure out what the production
4 crew looks like and start the hiring process."

5 Q And who decided that?

6 A That was basically Stacey Tennis and myself, kind of
7 went through the positions we need to really get going and
8 ramp up and get going for the spring.

9 Q You have described Willard, and of course, it is not
10 going anyway. You have described Galloway, and it is not
11 going anywhere, the people aren't -- what did you
12 initially contemplate, you and Stacey, with respect to
13 these inherited eight quarries? What was the sort of
14 business plan, if that is the right term, realizing you
15 were kind of coming from a blank sheet of paper, but what
16 was your discussion with respect to "Where do we start?"
17 Where were the piles that you had to work through? Help
18 us understand.

19 A You know, initially we thought we would be able to
20 have one crew, a full crew, production crew, that could go
21 to multiple quarries. As we got into the year, we kind of
22 recognized that we were probably going to need more than
23 one crew to be able to satisfy the requirements that --
24 for these Rural Quarries, especially considering we wanted
25 to expand. Currently we just had Fair Grove, Fair Play,

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1 Marshfield that we are currently selling out of. You
2 know, that was just three of the eight quarries that we
3 inherited.

4 We planned to get into the Stockton quarry and also
5 get into the Buffalo quarry in the coming year, so with
6 that -- with that in mind, you know, it -- it has been an
7 evolving plan, but initially it was let's get one crew in
8 and get started. We know we have got crushed in
9 Marshfield, we have got crushed in Fair Grove, we have got
10 crushed in Fair Play. We just continued to inventory
11 demands that we have got. Clearly as we got into it and
12 we had to hire people, we had to use a third-party
13 contractor to help us out at Fair Grove. We have that
14 same contractor in Fair Play. It -- we just had to have
15 staffing to satisfy the need, but we are definitely on
16 that trajectory. We're -- we want to grow the business.
17 We are getting the quarries -- in January of this year,
18 although it wasn't the eight quarries, you know, you can
19 park five of them and not have to worry about them, but it
20 is, you know, we want you to grow the business, and that
21 has been our intent, of coming up with the plan.

22 Q So, CRH, the parent, gave you marching orders, "Here
23 are your eight. Get them up?"

24 A In -- in no uncertain terms. I mean, it wasn't -- it
25 wasn't a -- "Here is eight operations you can have," and

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1 Those were the three.

2 Q Let's take the last one, the third one. What is his
3 name?

4 A Brandon Smith.

5 Q B-r-a-n-d-o-n?

6 A Yes.

7 Q Smith?

8 A Uh-huh.

9 Q He transferred in from where?

10 A He transferred in from Galloway.

11 Q To be a what?

12 A He transferred in to be a supervisor.

13 Q And when and why did he transfer out?

14 A He transferred in and we brought him down as a
15 supervisor. We just felt like he had a lot of experience.
16 He was interested in getting into that role. He -- he
17 exhibited characteristics that led us to believe that he
18 would be a good supervisor.

19 As I mentioned, the plant operations in Fair Play, it
20 needed a lot of maintenance, a lot of TLC to get it up and
21 running. Over the course of about five or six weeks, of
22 course, Stacey Tennis was there, as well, but -- but
23 Brandon was kind of left in the role of directing -- of
24 directing work as a supervisor, and he -- he just couldn't
25 handle the pressure involved with getting everything up

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1 and running, and -- and managing people and directing
2 people, and directing work, and he just decided that it
3 wasn't for him.

4 Q And where did he go?

5 A He actually transferred to our Willard operation. We
6 had an opening there.

7 Q Doing what?

8 A As a Sales Loader.

9 Q No supervisory functions there?

10 A No.

11 Q And that is why he left?

12 A Right.

13 Q And who took his place?

14 A One -- one of the guys that we hired.

15 Q Who?

16 A Well, Camrin Shoemaker.

17 Q Okay.

18 A He took over that position.

19 Q Okay, before I leave Google map and the Rural
20 Quarries, are -- were any of those in your initial game
21 plan, were any of those going to be considered year-round
22 operations?

23 A No. No. The volumes in these Rural Quarries are
24 such that with the size of plants that we have, there --
25 there are no operations that would justify having a

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1 production crew being there for the entire year. There --
2 that is just not how Rural Quarries are operated, in
3 general, unless there is a large sales volume. Typically
4 your Rural Quarries, they are -- they are just very rural,
5 they don't have a lot of production. Their sales demand
6 was -- so you know, that wasn't the plan. The plan was
7 that we would have a crew that would mobilize and move the
8 mobile equipment to various quarry locations to produce
9 whatever is needed for that -- for an entire year.

10 So, you know, initially we thought the Marshfield
11 quarry would require about four to five months of
12 production, enough for the whole year, and it has turned
13 out to be a little --

14 Q Before we leave the job description, Employer's
15 Exhibit 6, while it lists Primary Positions, let's
16 explain, and maybe you touched on it, but explain this
17 cross-training and inter-relationship to those of us that
18 aren't in the industry, what the law may require as far as
19 training and cross-training. Help us to better understand
20 that.

21 A So, we -- we are governed -- all of our operations
22 are governed under the Mine Safety and Health
23 Administration, which is very similar to OSHA, but it has
24 got a lot more in terms of documentation in it, especially
25 on procedures. Any employee can do any task, whether it

1 Q BY MR. KING: What is this, first of all?

2 A This is a copy of an invoice from a third-party
3 contractor that we use to process in April, May, and June
4 at the Fair Grove location.

5 Q So, is that the only subcontractor that you have
6 doing what we will call "operators work" at the Rural
7 Quarries?

8 A Yes.

9 Q Other than the blasting, I guess, or the other things
10 that you described. I mean, as far as doing the
11 operations work of the employees that are at issue here,
12 this is the subcontractor that did that; correct?

13 A Yes.

14 Q And that is Gillespie, G-i-l-l-e-s-p-i-e, Excavating
15 Company, spelled out, L. L. C.

16 A Yes.

17 Q Do you have a history with this subcontractor?

18 A Yes.

19 Q Where?

20 A They had processed recycled concrete for us in the
21 past.

22 Q In reference...

23 MR. KING: Well, I would like to introduce Employer's
24 Exhibit 10 into the record, with this clarification; the
25 rate and the amount figure on that document was redacted.

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1 Everything else is as it appears in the business record.
2 I discussed that with Ryan Smith, Attorney for the
3 Petitioner.

4 I would like to introduce Employer's Exhibit 10 into
5 the record with that clarification.

6 MR. SMITH: I have no objection, subject to those
7 redactions.

8 HEARING OFFICER NISLY: The exhibit is received.

9 **(Employer's Exhibit No. 10, received into evidence.)**

10 Q BY MR. KING: Referencing Employer's Exhibit 10, I
11 note that under description a period of time, April 27
12 through June 11, 2020. Was that the period of time that
13 they were engaged?

14 A Yes.

15 Q Have they subsequently been re-engaged?

16 A They have.

17 Q And how recent was that?

18 A They started in at the Fair Play location about two
19 weeks ago.

20 Q Why?

21 A We -- we haven't had the people and we have had the
22 demand at Fair Play, and we just couldn't get enough
23 people hired to -- to both finish at Marshfield, but then,
24 you know, meet the demands of the other locations.

25 Q And going back to Employer's Exhibit 9, I haven't

1 Q Even though this is Galloway, I would like to
2 introduce Employer's Exhibit 12, not as anything specific
3 to this case, but just sort of like an industry
4 descriptor, because you already kept this ten-year average
5 for Galloway in your business records.

6 A Correct.

7 Q For other reasons, but not this case.

8 A Correct.

9 Q You just pushed the button.

10 A Correct.

11 MR. KING: With that explanation, I will introduce
12 Employer's Exhibit -- offer to introduce Employer's
13 Exhibit 12.

14 MR. SMITH: No objection.

15 HEARING OFFICER NISLY: The exhibit is received.

16 **(Employer's Exhibit No. 12, received into evidence.)**

17 Q BY MR. KING: Trying to go back to these Rural
18 Quarries, again, the Galloway tail doesn't wag the Rural
19 Quarries' dog, but you have already described the sales
20 side and the cycle there. Do you anticipate even more of
21 a shutdown, even -- through the winter months, of your
22 Rural Quarries?

23 A So, I think it -- it is important to note, that based
24 on the volume, it happens in the Rural Quarries, it is --
25 based on my knowledge of the industry, I think Rural

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1 Quarry markets are more cyclical in nature in terms of
2 being seasonal than say the larger metropolitan areas,
3 like Willard and Galloway. So I would expect to see even
4 a bigger bell curve with the Rural Quarry operations.
5 They are much more rural when it comes to construction and
6 you see a lot less construction going on in the wintertime
7 in these rural operations, so I -- I think, you know, if
8 -- ten years from now, we are living in a sales curve, or
9 -- I think you will see a bigger downturn in the winter
10 months than what the Galloway operation did.

11 *[Long pause]*

12 Q Just before we leave the benefit listing, what --
13 what is the normal pay period and pay day for the
14 employees in this unit --

15 A Our pay periods are Sunday through Saturday, and pay
16 day is on the following Friday, weekly.

17 Q Thank you.

18 If I understand your testimony, the -- you do -- you
19 personally were not down in the weeds, and we just refer
20 to Robin's testimony about hiring, posting, all of that
21 other stuff.

22 A Right. That is not part of my responsibility.

23 Q And while I referenced it in relation to
24 subcontracting, I want to make sure it is clear that with
25 respect to the operations people at issue in this case,

1 A No.

2 Q You mentioned there was a situation with respect to
3 this Universal Crew. Without going into whether it is
4 someone who is currently there or not there, do you recall
5 that you said that there was an employee in the unit who
6 was either exposed to or tested positive for COVID-19?

7 A Yes.

8 Q Around when did that happen?

9 A It has been about three or four weeks ago.

10 Q Okay. Have you had any -- without identifying the
11 names of the employees, have you had any other employees
12 at other quarry locations test positive or have to self-
13 quarantine?

14 A Yes.

15 Q And roughly how many?

16 A Two.

17 Q Do you recall where those were, or when they were?

18 A Yes. We had one at Willard, and he is returning to
19 work this week after two weeks being positive, and we have
20 another that is currently off at our Galloway operation in
21 quarantine.

22 Q Okay, with maybe the exception of sickness and things
23 like that, you would agree that generally at the other
24 quarry locations, there is not a lot of turnover; is that
25 true?

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1 related, and so Montevallo is a quarry located near
2 Nevada. Should a job come up that we want to actively
3 pursue to sell material into, then we would wait until
4 that job came about to be active on that site. It would
5 be similar at any other locations, with the exception of
6 -- we believe Buffalo and Stockton and potentially Bolivar
7 could have enough of the market that we would want to
8 pursue that sooner, and make it more of an active
9 residential and commercial construction quarry, and not be
10 necessarily job specific.

11 Q And what is your business models tell you about when
12 that is likely to happen?

13 A Well, the sooner we can get into those markets. We
14 have already identified them as potential regular quarry
15 sales yards. So, we would like -- the sooner that we can
16 get crews established and get inventory established, that
17 we can go into those markets.

18 Q Do you have to purchase assets to make those quarries
19 operational, or do you already have those in stock?

20 A We don't have to purchase assets, but we do have to
21 acquire assets, whether internally or externally.

22 Q Does that mean like leasing from CRH, or what do you
23 mean by that?

24 A Externally means if we were leasing equipment.
25 Internally would be assets are already available somewhere

1 in the CRH system.

2 Q Have you engaged any third parties to lease or rent
3 any assets for those other quarrying operations?

4 A We have engaged vendors, yes, to price out costs for
5 renting equipment. We already know the costs for mobile
6 equipment rentals.

7 Q Have you entered into any contracts with those
8 vendors?

9 A We don't have contracts. We have purchase orders,
10 which I guess could be considered a contract, for rental
11 of some of the mobile equipment, yes.

12 Q And pursuant to those purchase orders, do you have
13 custody of that equipment currently?

14 A Yes.

15 Q So is it -- just bear with me...

16 Is a purchase order the same as a lease?

17 A No. A purchase order is just an agreement at a set
18 price.

19 Q Okay, so you -- do you have any lease agreements,
20 though, that you discussed?

21 A No, no lease agreements.

22 Q Okay, so your purchase orders, does that cover all of
23 the assets that will be required to run those quarries?

24 A As we currently have them, yes. This means that we
25 didn't add additional purchase orders for when we need it.

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1 specialized concrete-quality stone, and that level --
2 this is constant throughout the year.

3 So, while there is a core construction level of
4 commercial construction, residential construction, it
5 slows down in the wintertime, the winter months. We
6 would consider that a slower period, but when you add on
7 the layer of the concrete quality materials, then that
8 puts Willard in a little different category, and flags
9 -- there is still a little bit of bell curve at Willard,
10 but it is a little bit flatter, because they have this
11 level of business that is related --

12 Q Which these Rural Quarries do not.

13 A That's correct.

14 Q And do you stand by your testimony that Willard is
15 more flat than Galloway, that the Rural Quarries would
16 be more of a bell curve than Galloway?

17 A That is correct. And it is very job dependent, as
18 well.

19 So, we had a job in Marshfield that was specific to
20 that location, because of the proximity of the work, so
21 that particular job created a spike in that curve for
22 about three months.

23 Q Things are a little lower know about this
24 unexpected demand and this customer sort of inherited
25 some of these -- the Marshfield plant. Can you help us

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1 Q So, whether the roving crew or the Universal Crew
2 is there or not, you would have those three staffed
3 already; correct?

4 A Correct.

5 Q And I believe that he said they had already
6 purchased or arranged for equipment that will be moved
7 into these other quarries, as soon as you can get
8 approved to operate them, correct?

9 A Correct.

10 Q And when did the arranging of that equipment start
11 in this process, from you getting them in January?

12 A We probably started moving equipment in April, and
13 the -- the -- all of the equipment associated would move
14 with the people from Fair Play to Marshfield. If we had
15 to move to another location, we would use mobile
16 equipment. If we had to move into a site that didn't
17 have a crushing plant, we would have to rent that plant
18 at that time, but we currently only did it at Fair Play
19 and Marshfield, both of which had a plant already.

20 Q A crushing plant?

21 A Yes.

22 Q But you had to take -- or if you had a crushing
23 plant ready to go, and then --

24 A Yes.

25 Q Or as soon as it is moved?

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1 THE COURT REPORTER: Would you raise your right
2 hand, please?

3 (Whereupon,

4 **STACEY L. TENNIS**

5 having been sworn/affirmed, was called as a witness
6 herein, and was examined and testified via video-
7 conference, as follows:)

8 HEARING OFFICER NISLY: Okay, you can have a seat.

9 If you would, state your name and spell it for the
10 Court Reporter.

11 THE WITNESS: Stacey L. Tennis, S-t-a-c-e-y, middle
12 initial L, last name is T-e-n-n-i-s.

13 HEARING OFFICER NISLY: Thank you.

14 DIRECT EXAMINATION

15 Q BY MR. KING: Stacey, how long have you worked for
16 the Company?

17 A Nineteen years.

18 Q And in what positions?

19 A I started out as a Utility Operator, then Pressure
20 Operator, pretty much every position down there.

21 Q And at what location did you work?

22 A At Galloway.

23 Q And that position that you described, was it a
24 Union position?

25 A Yes.

1 late April or early May of trying to get the crews
2 started in there, so get everything going and trying to
3 get some crews hired, so. That is what we were
4 projecting then.

5 We run into some issues.

6 Q All right, explain.

7 A The plant at Fair Play, we got there and it was not
8 what we were explaining, so just probably spent six
9 weeks working on it, four to six weeks to get it up to
10 standards with the crew that we had, that we hired, and
11 then we ran that crew there probably six to eight weeks
12 at the most before we moved to Marshfield, to get the
13 demand up there.

14 Q So that six weeks of needing to get it in shape was
15 not anticipated by you going in the front door?

16 A No.

17 Q Had you not had that, would you have expanded to
18 that second crew, except for that?

19 A Possibly yes. Once we got in there and seen what
20 we had.

21 Q That would probably explain some of the hiring
22 waves that came in.

23 Again, getting back to my question, let's continue
24 with what you were told coming in the front door. You
25 ran into a problem, and -- so what were your marching

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1 you, General Superintendent, who -- who was in place
2 before Camrin Shoemaker?

3 A Brandon Smith.

4 Q So, explain to us how he got there, what he was
5 tasked to do, and how he inter-related with you and Mr.
6 Upp.

7 A He worked for me at Galloway Quarry, and we heard
8 that we may have this Universal Crew, he lived in the
9 Fair Play area and was considered -- considered for a
10 transfer, and not in the Lead Man position. I said,
11 "Let's talk," and we talked, and I thought he would make
12 a good prospect for it, so we took him on and went up
13 there with him. We looked it over and hired the crew.
14 He did most of the initial training, as far as the
15 maintenance and some of the equipment that we had at the
16 time, until the demands, I think got to him, and he
17 asked to move on to Willard.

18 Q Okay, could you get Employer's Exhibit 4, which is
19 the state -- yeah. Yeah.

20 Where are you based, in a given week -- let's start
21 in -- well, let's start before January. Let's start in
22 late December, where were you based and where did you
23 work?

24 A At Galloway Quarry.

25 Q Period?

1 A Yeah.

2 Q Since taking over the -- the Rural Quarries, where
3 have you been based, and from where do you work?

4 A Most of the time, I am based where the Universal
5 Crew is. I am not -- at the beginning, I was there more
6 than now. I am in and out. I am in there a few hours,
7 and I maybe in four different quarries before the day is
8 up.

9 Q Is it safe to say that you can't supervise all of
10 those locations?

11 A Yes. I rely on my supervisors, lead man, there to
12 take charge when I am not around.

13 Q And the one that left and went to Willard, the
14 types of things -- well, was he -- help us understand
15 how he was helping you. You said training --

16 A Yes.

17 Q What else did he do for you when you couldn't be
18 there?

19 A He would -- you know, when I couldn't be there,
20 especially to start the day, he would start the crews,
21 let them know what the plan was for the day, what
22 maintenance we needed one, and let them know the hours
23 we were working. Anything that was needed, he would try
24 to get on the phone and get the parts ordered, and try
25 to keep the day to day operation going with what we

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1 needed and the plan to move forward. If problems would
2 arise, he was there to take care of them.

3 Q And now, let's just take the ordering. He had the
4 authority to do that on his -- on his own?

5 A Yes. He had some. He was being trained in the
6 process, stepping into that position, and it takes a
7 little while to understand all of the ordering process,
8 but he had -- he was ordering some parts that he was
9 used to at Galloway.

10 Q And he left to go to Willard approximately when?

11 A I am trying to remember the -- probably late June,
12 just approximate.

13 Q And when -- who took over his position when he
14 said, "I can't do it," and went to Willard?

15 A For a little while there was nobody. Basically --
16 then I would have to stay there all day, and then we
17 approached Camrin about doing a trial as the Lead
18 person, and also I offered the other guys a chance, so
19 Camrin did it a week right off the bat, then probably
20 month later after Brandon left, all of the guys said
21 they liked his representation of them and how he led
22 when I wasn't there. So, I told him that he was still
23 on a trial, and that probably lasted, probably forty
24 days, approximately, that he was kind of on a trial
25 basis, just to see -- while I trained him to do the

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1 different parts and stuff, and now, he has been moved
2 up.

3 Q And, as far as -- was there a pay increase for
4 that?

5 A Yes. November -- on approximately November 9th, he
6 got a dollar an hour increase.

7 Q Was there any other period that we need to fill in
8 the blanks as far as -- the other guy was gone for about
9 a month, and you tried him out for a week. Nobody
10 rebelled against him, and so then he went into a forty
11 day, thirty or forty-day training. Was --

12 A Yeah. Sorry.

13 Q I am just trying to get the scene here. So, is
14 there any other hole that we missed?

15 A No. Well, the holes -- when there was no lead man.
16 I had to be there daily. It was hard to try to lead and
17 do other things. I had to handle myself until I got
18 enough faith in some of them and I said, "Okay, we are
19 going to do a trial and see who can handle being the
20 lead man, unless I find somebody to come in with enough
21 experience."

22 Well, the trial has worked, Camrin has stepped up.
23 He learns more and more as he goes.

24 There was maybe thirty days, I guess, approximately
25 thirty days that there was no true lead person, just me,

1 on-site.

2 Q Okay, and where do you reside?

3 A I -- my homestead?

4 Q Yes.

5 A I live in Clever, Missouri.

6 Q Okay, help me -- in relation to No. 4, where is
7 that?

8 A Clever is just south of Republic, Missouri, so to
9 drive to Marshfield, it is an hour drive. Fair Play is
10 an hour drive. Galloway is a thirty-minute drive.
11 Buffalo is probably -- I am trying to think; it is a
12 little over an hour from my house. Fair Grove is
13 probably about forty-five minutes. About all of them,
14 until you get on out to Stockton and Montevallo from my
15 house, are about -- are at least an hour to an hour and
16 a half.

17 Q We have the work hours for the crew in evidence.
18 What -- what does your typical week consist of?

19 Well, let's go on back to when we started in
20 January.

21 A Uh-huh.

22 Q If you can give us a rough idea of the number of
23 hours per week.

24 A Probably at the time in January, I was pushing
25 fifty, and then it got up to seventy and sometimes more,

1 trying to get all of this lined out.

2 Q And when you had the guy who went to Willard in
3 place, help us kind of know what your hours -- how have
4 they been affected as we go through the --

5 A Yeah, when he left, then I needed to be there at
6 6:00 o'clock in the morning to start, because they need
7 somebody, and part of -- somebody has to have authority
8 on site. It doesn't matter how many -- there has to be
9 somebody with authority on site, so somebody to be there
10 with authority -- I didn't have the freedom to leave
11 when I had Brandon Smith there.

12 Q Okay.

13 A So I had to be on-site, and that made it more hours
14 for me to have to be there every morning at 6:00, so to
15 sometimes 6:00 at night.

16 Q Five days a week?

17 A There was a few Saturdays when we was at Fair Play,
18 but not too many, but a few; maybe three or four.

19 Q So, if my math is correct, about seventy to eighty
20 hours?

21 A Yes, I did do that for a while.

22 Q Help us understand this, you would have to have
23 somebody in authority on-site.

24 A When the MSHA inspector comes in, the Federal
25 Inspector, they ask who on-site has the authority to

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1 represent if there is an issue, whether it is, you know,
2 a safety issue or whatever issue it is, they needed
3 somebody to be there to represent -- as an authority
4 figure, so they -- MSHA wants to know who that is as
5 soon as they come on-site, unless they have been there
6 years, and they know who it is. They always ask.

7 Q It can't be done by video conference, can it?

8 A We have not -- not that I have been -- I have not
9 done any like that. They are still coming out and
10 inspecting us.

11 Q So when Brandon was there, Brandon Smith, he had to
12 have authority?

13 A Yes. If MSHA showed up, he wouldn't deal with
14 them, but we always have all of our supervisors call the
15 Safety Director, and then the site person that is on --
16 like the lead man, would take MSHA around until the
17 Safety Director gets there, and then they stayed with
18 them.

19 Q And currently, now that he has gone through the
20 training, is that Camrin?

21 A Yes.

22 Q Is he fully authorized to act for the Company?

23 A He has already met with one MSHA Inspector when I
24 was gone, and he sent the Safety people down, but he was
25 with them a couple hours by himself.

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1 Q Since he has been trained, and now is on-site and
2 authorized in that way, has that helped with your hours?

3 A Yes.

4 Q And where have you been able to go to?

5 A Some -- I have cut coming in at 6:00; sometimes I
6 don't get there until 7:00. I can go to the other
7 quarries and check in on things, and I don't have to be
8 down there a whole eleven hours a day, so it has kind of
9 cut me back. I can go home at a decent time, and not be
10 there the whole time. Nice to have somebody there in a
11 lead position that I can trust.

12 Q Is it safe to say that with respect to Galloway,
13 and now the Rural Quarries, that it is simply not
14 possible for one person to supervise all of that?

15 A No, you need somebody on-site at all times. I
16 mean, I oversee them, but then you need somebody on-site
17 to take care of problems that arise.

18 Q With respect to Camrin, I think you referenced --
19 does he assign work?

20 A Yes. During the day -- most days we go in and our
21 plan is to run, but if something happens or say somebody
22 is late, he will move people around to meet the demand.
23 Or if something breaks, he gets the guys assigned to the
24 job, whether he needs two or five, and if he only needs
25 two, he will take the other three off to do something

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1 else.

2 Q Are they required to follow his directions?

3 A Yes.

4 Q And with respect to vendors, there has been some
5 testimony by Mr. Upp, and again I am a little ignorant
6 of this, of what might break and what you might have to
7 order, how is he functioning in that?

8 A He is -- he is getting better. He is learning the
9 parts. As far as ordering, he is slowly getting into
10 that. He has dealt more with drilling and blasting as
11 he has ordering parts, which is outside contractors, and
12 that -- that can be a job in itself, because you have
13 got the safety of your men, and he has to coordinate
14 throughout the length of the blast, coordinating the
15 blasting.

16 Q Help us better understand that.

17 A So, when they -- when a drilling company comes in
18 -- the blasting company comes in and lays out a shot
19 pattern, and then the driller comes in and he has to
20 drill the holes, but Camrin or me has to make sure he is
21 following our safety guidelines, or if there are any
22 issues, he calls one of us.

23 Once that is done, the blasting company will come
24 in and load the product into the holes. So you have to
25 clear the area out and make sure everybody is clear, so

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1 when we blast, we don't have any incidents with anybody
2 getting hurt. So he makes sure the guys are with him
3 and we are where we are supposed to be, and then
4 coordinates with the blaster, and sounds the horns and
5 the time protocol, and then the shot goes off.

6 Q And again, the other crew members are required to
7 follow his directions?

8 A Yes.

9 Q With respect to customers, at these Rural Quarries,
10 how -- being in that position, how does he interchange
11 with them?

12 A He -- he is getting better. He is slowly getting
13 into that. We are not trying to throw everything on him
14 at once, so it is a slow training, but he is getting
15 some of those calls where he needs to know, "Hey, we
16 need to change the rock. We have got a big rock in here
17 that won't go down, and we need to find out why? What
18 has happened to this product, what he needs to know to
19 fix it.

20 Q And so, he can, you know, laterally do that, to fix
21 it?

22 A Uh-huh.

23 Q As far as acting an agent for the Employer, I think
24 there was some like ordering that he might be able to
25 sign off on. How does he operate that way?

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1 A We have slowly had him try to meet some of the
2 vendors to come in, so he is starting to meet them and
3 understand what they sell. He is starting to get some
4 of their phone numbers. He understands the product. We
5 have had some vendors come by and talk to him about how
6 things work, what they can do for us, so he understands
7 where they go, and the work process, and he knows
8 systems. It is something he can work on later, but he
9 can at least make the phone call and get the parts there
10 that he needs to continue production.

11 Q On his own?

12 A On his own.

13 Q Mr. Upp testified that they are really getting him
14 ready to fire yet. Do you concur?

15 A Yes.

16 Q And have you had anybody -- well, let's take that
17 second person who was being talked to and then walked
18 out. Did that involve --

19 A Yes.

20 Q When did that occur? Who was it and where did it
21 occur?

22 A It was at Fair Play. It was Kris Willoughby. I
23 don't remember the exact date of it. It was probably in
24 June, maybe early July.

25 He was doing part of the job and the belt was

1 A Yes. This -- with winter approaching, normally we
2 will be cut down, but once we get our demand back or the
3 weather cuts into it, it is ten.

4 Q Let's go to that a little bit.

5 You -- you are closer to the scene.

6 A Uh-huh.

7 Q What do you anticipate now with these Rural
8 Quarries? It is now, November, whatever it is. A
9 shutdown, a slowdown? What do you anticipate now?

10 A At the Marshfield Quarry, it is what you call a wet
11 system; we run water to wash the rock. So once it gets
12 freezing and stays freezing, your pumps that pump water,
13 the hoses are going to freeze, so that plant, once it
14 gets to freezing and stays, we won't be able to run that
15 plant. It is a wet system where some plants are dry.
16 That will be the biggest issue at Marshfield.

17 Fair Play is kind of up in the air. It has got to
18 be -- you know, if it is freezing cold, you can't hardly
19 run the equipment. We will break down twice as much if
20 it gets below twenty degrees and stays there.

21 Q Do you anticipate layoffs?

22 A Just -- that -- yes and no. I mean, it is going to
23 depend on what the weather does. It is touch -- in
24 Marshfield, it is going to get slow, and there could be
25 small, minor layoffs.

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1 going.

2 Q It takes what?

3 A Pumping. You have to pump the water out, because
4 there is always a low spot in the pit, so you have to
5 pump the water out if you get a lot of rain.

6 Q Let's go back to Employer's Exhibit 3.

7 So there are batches of water in these?

8 A Yes, at the ones we have been at.

9 Q Well, that's okay.

10 So there is a pumping system?

11 A Yes. The pit will get under water and you can't
12 run -- I mean, it gets so deep that you can't drive your
13 mobile equipment out there to load the product. So we
14 are just -- so it is a safety issue, plus it is hard on
15 -- there are mechanical problems, as well as safety.
16 So, you have to run pumps to get the water out.
17 Sometimes you cannot run. Spring rains can shut you
18 down, and the -- when you have a very minimal crew, you
19 only have half a crew.

20 Q I don't need to go through the COVID stuff again,
21 but in a perfect world, what were you wanting to have
22 accomplished by next April or May?

23 A Well, hopefully we can have another crew hired
24 where we can combine them when we need to, or we can
25 split off and go to Fair Play. In the future, maybe

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1 next summer or later, either try to do Buffalo,
2 Stockton, and occasionally we head back into Fair Grove
3 and do a small batch here and there.

4 Q And just from your perspective, what is your
5 anticipated body count, both coming in the front door
6 from Mr. Upp's testimony, just from your closer eye
7 view, what is going to be needed to run these the way
8 CRH wants?

9 A We are going to need at least fifteen people, and
10 maybe up to twenty, depending on how far we expand into
11 these other sites. That is the only way we will be able
12 to keep everything going that we need to do.

13 Q Are there any plans to change the hiring process or
14 increase the pay, or anything to kind of jump start this
15 a little bit?

16 A I mean, everything is -- like now, staying the way
17 it is set up on the benefit sheet, if somebody did come
18 in with experience, we would consider more money if they
19 came in highly-qualified.

20 Q And the work is there for fifteen to twenty, and
21 forty hours a week, as soon as we get them.

22 A Yes.

23 Q Final thing, with respect to Camrin --

24 A Uh-huh.

25 Q If you are successful with the fifteen to twenty,

1 MR. KING: I believe that is all of the questions I
2 have at this time.

3 CROSS EXAMINATION

4 Q BY MR. SMITH: All right, I have some cross
5 questions for you.

6 A All right.

7 Q The first one is something I thought I heard, but I
8 -- I wasn't sure if I heard it correctly, so I was just
9 hoping you could clarify.

10 Did you say that certain on-site supervisors at
11 Galloway are actually included in the Boilermakers'
12 unit?

13 A Jason Page is not. I was at one time when I was
14 there.

15 Q Was or was not?

16 A I was when I was there. Jason Page who is the Site
17 Supervisor now, is not.

18 Q And when you were there, were you a supervisor
19 there when you were in the unit, or just a production
20 worker?

21 A I started out as Production, and then moved into
22 Supervisor.

23 Q And in both capacities, you were in the bargaining
24 unit?

25 A Yes.

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1 Q Are those pretty routine purchases, or do they --
2 or is that kind of an abnormal thing?

3 A We have routine and abnormal both. It just depends
4 on what happens, but you also have your routine things
5 you need to keep in stock.

6 [Long pause]

7 MR. SMITH: Okay, I think I will let you off the
8 hook.

9 THE WITNESS: Okay.

10 MR. SMITH: Thank you.

11 MR. KING: A little bit of redirect.

12 HEARING OFFICER NISLY: Okay.

13 REDIRECT EXAMINATION

14 Q BY MR. KING: How often per week, let's say -- just
15 currently, the training, etc., how often could Camrin do
16 things now that otherwise you would be doing, in other
17 words, if you were there, he is doing what you would do,
18 except you are not there?

19 A Well, I know last week, for example, I was only
20 there one day for a full day. Several days I was not
21 even there, and a couple days I might be there two
22 hours, and that is all. So he is pretty well in charge
23 over sixty percent that week, maybe seventy percent last
24 week, and he is progressing more and more, with the TASK
25 training and more and more of the authority positions.

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1 He is still learning as he goes on who to call and
2 stuff, and getting numbers. It is gaining as the weeks
3 go by.

4 Q And with respect to the 53 1/2 hours, trying to go
5 back to 40, obviously you've needed product, and Camrin
6 is qualified to produce product when you need product,
7 so maybe eighty/twenty now, projected however, once you
8 get the crew in place, is that going to flip, or is it
9 going to be all supervision? How do you see that?

10 A Eventually it should flip, based on -- it is going
11 to be a gradual flip, depending on how many people we
12 get hired, and you know, the speed of it. So he will
13 slowly go to seventy, sixty, you know, and in a year or
14 two years, it could be all supervision.

15 *[Long pause]*

16 Q A little bit on purchases, only because of the term
17 "routine" or "abnormal," and we don't need to get into
18 that, whether it is a routine purchase, whatever that
19 means, or an abnormal purchase, and you were talking
20 about Camrin having responsibility for the purchasing
21 from vendors, it would be for both, would it not?

22 A Yes, he -- he -- let me rephrase it. He is still
23 being TASK trained to do this. He has got some
24 authority but he is still learning to do all of talk
25 that he can do.

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1 mail ballot election." So I would take that as the
2 latest guidelines for what kind of information they are
3 looking for to make a decision on whether it would be
4 mail or whether it would be manual, if they decide to
5 hold an election at this time.

6 MR. KING: We don't -- we aren't going to argue
7 that position now. You have got the new case that came
8 down from the NLRB itself, so it speaks for itself.
9 Yes, we both are aware of that case, both have seen it.

10 There is the new GC-2101, November 10, memorandum,
11 based on that case, which we both have access to, which
12 also references the earlier July 6, 2020 GC Memorandum
13 20-10.

14 This stuff right here is what John Hopkins prints
15 off, everything that you would ever want to know about
16 COVID, and a little note, that is why I put these
17 counties into the record there, because it is my
18 understanding that the full disclosure is that none of
19 this makes any difference until we have the date of the
20 Decision.

21 HEARING OFFICER NISLY: And --

22 MR. KING: Then if we go back fourteen days from
23 that date, which doesn't exist yet. So all this is is
24 nice historical stuff as of today or yesterday, or
25 whenever my people printed it off.

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ATTACHMENT

4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Conco Quarries, Inc.

Employer

and

Heavy Construction Laborers' Local #663, affiliated
with Laborers' International Union of North America

Petitioner

Case 14-RC-267769

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of equipment movers and operators employed by the Employer at its eight rural quarries in Missouri.¹ The unit proposed by the Petitioner would include approximately six employees working among the active operational rural quarries as of the date the hearing.

The Employer agrees that the proposed unit is appropriate but asserts that the current complement of employees is neither substantial nor representative of the workforce that will eventually be employed in the bargaining unit and, further, that its rural quarry operations are seasonal in nature, therefore, conducting an election at this time would be inappropriate. In this regard, the Employer contends the petition should be dismissed, or in the alternative, that an election should not be held until May 2021. The Employer additionally asserts that proposed unit lead employee Camrin Shoemaker is a statutory supervisor within the meaning of Section 2(11) of the Act based on his authority to assign and responsibly direct the work other employees using independent judgment, and other secondary indicia. Petitioner contends that there is a substantial and representative complement of employees and that the rural quarry operations are not seasonal in nature, therefore, an immediate election is warranted. Petitioner also denies that lead employee Shoemaker possesses any indicia of supervisory authority. Finally, the Employer contends that a manual election is appropriate and that it is possible to conduct a manual election safely notwithstanding the issues related to the COVID-19 pandemic.

¹ In its petition, Petitioner originally sought to represent all employees engaged in hauling, crushing, processing, and loading of aggregate at the Employer's Marshfield and Fair Play rural quarries. At the hearing, the parties' stipulated that any unit found appropriate should include equipment mover and operator (haul truck, loader, mechanic, plant, quality control, rolling stock equipment (dozer, excavator, etc.), quarry maintenance, and water Truck) employees; and Petitioner continued to take the position that the unit should be limited to employees at the Marshfield and Fair Play quarries. In its brief, Petitioner stated it would adopt the position of the Employer that the stipulated unit include employees working among all eight of its rural quarries located in Marshfield, Fair Play, Fair Grove, Bolivar, Buffalo, Montevallo, Pittsburg and Stockton.

A hearing officer of the Board held a video hearing in this matter. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). The parties were permitted to present their positions on the voting method and details of election at the hearing and by brief. I have carefully considered those positions and arguments. As explained below, based on the record² and relevant Board law, I conclude that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit and that its rural quarry operations are not seasonal in nature, therefore, it would not effectuate the purposes of the Act to deny or postpone an election among the employees in the existing operations. I further conclude that the Employer has not met its burden to show that lead employee Shoemaker is a statutory supervisor. Based on the record developed in this case, Shoemaker does not exercise authority in the interest of the Employer requiring the use of independent judgment to assign or responsibly direct other employees or possess any other indicia required for a finding of supervisory status. Accordingly, I shall direct an election in the petitioned-for unit, as stipulated. Finally, after carefully considering the arguments made by the parties on the issue of election arrangements in conjunction with the Board's recent guidelines set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020) and the six factors therein the Board has ordered me to consider in determining whether or not to order a mail ballot election, I have determined that a mail ballot election is appropriate in view of the circumstances discussed below related to the current state of the COVID-19 pandemic.

I. FACTS

A. Employer's Quarry Operations and Collective Bargaining History

The Employer, a subsidiary of Conco Companies, has been in existence since about 1963 and in the business of producing construction aggregate. For many years, the Employer has operated two union-represented quarries located in Willard and southeast Springfield, Missouri. The Springfield location is known as the Galloway quarry. At the Willard quarry, the Employer has separate collective-bargaining agreements (CBAs) with the Operating Engineers, Teamsters and Laborers' Unions covering its production/maintenance employees.³ At the Galloway quarry, the Employer has a CBA with the Boilermakers Union covering its production/maintenance

² The parties filed briefs which I have duly considered.

³ The Operating Engineers Union represents large equipment loaders; the Teamsters Union represents truck drivers; and the Laborers' Union represents maintenance employees and drillers.

employees.⁴ The Employer also operates redi-mix concrete companies located in Springfield, Hollister, and Nixa, Missouri.⁵

Andrew Baird is the President of the Employer, Chris Upp is the Vice President/General Manager, and Jacci Gamble is the Assistant General Manager. The unit employees at the Willard quarry report directly to Pit Supervisor Jim Smith and Plant Supervisor Dave Stillings who report to Gamble. The unit employees at the Galloway quarry report directly to Site Supervisor⁶ Jason Page who reports to General Superintendent Stacey Tennis. Tennis was the Site Supervisor at Galloway until January when the Employer commenced operations of the rural quarries, as further described below, at which time she became the General Superintendent for Galloway and the rural quarries. The petitioned-for rural quarry employees report directly to Tennis.

The production process for quarry operations at the Willard and Galloway quarries initially begins in the mining area known as “the pit” with unit operators stripping the top of the rock in order to access the reserve rock for processing. Stripping operations involve using large equipment including trucks, loaders, dozers and excavators to strip off six to eight feet of dirt, clay and other material from the rock which is then piled up away from the pit. Then, unit drillers drill holes in the rock so that third-party explosive contractors can blast the rock out of the earth into a “shot rock pile.” Blasting operations occur on average about two to three times per week year-round (about three to four times a week in the spring/summer/fall months and once a week in the winter months). The rock is loaded by unit loaders from the shot rock pile onto front end wheel loader trucks for unit drivers to transport to the plant “dump hopper,” a large bin structure that feeds the rock into a crusher. Processing operations (crushing and sizing) are performed by unit maintenance employees in the stationary plant area of the quarry. Most of the rock is crushed to a one-inch size or smaller. The final product is then sold by non-unit sales employees working at the plant.

The Willard Quarry is the largest quarry operated by the Employer – the union-represented employees there perform all quarry operations there except for blasting, which is performed by a third-party contractor. The Galloway quarry is about one-third of the size of Willard – the union-represented employees there perform all quarry operations there except for drilling and blasting, which are performed by third-party contractors. The Willard quarry specializes in concrete quality stone which it supplies to concrete plants year-round on a regular basis. The Galloway quarry is more construction-driven and follows a general construction pattern which slows down during the winter months of December to April. At both quarries, unit employees have been laid off from time to time on a short-term basis of about one to three days

⁴ Specific classifications at the Galloway quarry include: pressure operator, pit loader, truck driver, water truck, quality control, dozer, excavator, utility, maintenance, and shop mechanic.

⁵ These companies’ names are Concrete Company of Springfield, Concrete Company of the Ozarks, and Christian County Concrete Company, respectively. The record indicates that the Concrete Company of Springfield and Christian County Concrete Company are Laborers’ Union-represented facilities.

⁶ The record indicates that the Site Supervisor position at Galloway is a bargaining unit position. It is unknown whether the Pit Supervisor or Plant Supervisor positions at Willard are likewise bargaining unit positions.

due to inclement weather. No unit employees have been laid off for extended periods. All quarry operations are regulated by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), a federal agency which develops and enforces safety and health rules for all U.S. mines.

In about July 2019, CRH, a global diversified construction building materials supplier based in Ireland, purchased the assets of the Employer. At this time, the Employer became a wholly owned subsidiary of CRH.

B. Employer's Rural Quarry Operations and the Universal Crew

In about late 2019, CRH advised the Employer that effective January 1, 2020,⁷ it would inherit operations for eight rural quarries all located in Missouri, in Marshfield, Fair Play, Fair Grove, Bolivar, Buffalo, Montevallo, Pittsburg and Stockton.⁸ At this time, Stacey Tennis, who was the Site Supervisor at Galloway, was promoted to General Superintendent. As General Superintendent, Tennis is in charge of the Galloway quarry and all of the rural quarries. As noted, the Galloway unit employees report directly to Site Supervisor Page who reports to Tennis, and the petitioned-for employees at the rural quarries report directly to Tennis.

Based on the rural nature and smaller size of the rural quarries, the Employer determined it would utilize a mobile crew with portable equipment that could work among all of the rural quarries. The Employer also determined that it would hire one "universal crew" that would be cross-trained to perform all quarry duties. In this regard, the "Portable Quarry Crew" job description for rural quarry workers states that "production/maintenance positions are interchangeable depending on production/maintenance needs" and that "primary positions" include loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, and dozer/excavator/large equipment operator. These are largely the same quarry duties performed by the Willard and Galloway unit employees except that all stripping, drilling and blasting operations at the rural quarries are performed by third-party contractors.

Although the Employer was assigned the rural quarry operations in January, because of the large amount of inventory it inherited along with the operations, rural quarry sales loaders⁹ employed by the predecessor employer continued working at the Fair Play rural quarry selling existing inventory until about April to May when inventory became low and the Employer commenced hiring of its universal crew. The Employer originally planned to start up operations at all of the quarries at this time, however, due to the condition of the quarries and the need for more updating and maintenance than expected, as well as the COVID-19 pandemic contributing to difficulties in hiring qualified employees for its universal crew, startup operations were significantly delayed. As of the date of the hearing the Employer had hired the six petitioned-for employees who started working in about May at the Fair Play rural quarry for approximately

⁷ All dates hereafter are in 2020 unless otherwise stated.

⁸ Previously, the rural quarries were operated by Ashgrove Aggregates, another subsidiary of CRH.

⁹ The parties agree that sales loaders should be excluded from any unit found appropriate herein.

eight weeks and then moved to the Marshfield quarry to start up operations there.¹⁰ As Marshfield operations grew more rapidly than expected and the Employer continued to face challenges in hiring, there were not sufficient employees to cover operations at both Marshfield and Fair Play resulting in the Employer engaging a third-party contractor to perform work at Fair Play. During this time, from about April to June, and again more recently in November, the Employer also engaged a third-party contractor at the Fair Grove rural quarry to cover work demands there that could not be met by the universal crew. To date, only the Fair Play, Marshfield and Fair Grove rural quarries are active and operational. The Employer has no firm plans to activate operations at any of its five remaining rural quarries in the near future but has taken some steps to start up operations at its Buffalo and Stockton rural quarries. These steps include engagement of some vendors and procurement of some purchase orders. However, the Employer has not entered into any lease agreements or acquired necessary assets to start operations there anytime soon. The Employer hopes to start activating those quarries in about Summer 2021.

The Employer anticipates that two universal crews of about 10 employees each will be necessary to run all eight of its rural quarries, for a total of 20 rural quarry employees. Based on the progression of rural quarry operations to date, the Employer anticipates it will take at least one year to build up to its first universal crew of 10 employees.

General Manager Upp and General Superintendent Tennis have been in charge of all hiring for the rural quarries. The hiring process consists of Upp and Tennis advising Human Resources (HR) Generalist Robin Patnode¹¹ as to the number of job openings available which Patnode posts to the Employer's internal intranet as well as on various state and federal job boards including veterans and disabled employees organizations. Patnode conducts initial screening of applications, forwards viable candidates to Upp and Tennis for review, and sets up interviews of desired applicants. Upp and Tennis interview applicants and make hiring determinations and job offers and rejections are conveyed by Patnode.

The petitioned-for employees were all hired in as 30-day probationary employees at \$17.00 per hour plus benefits including paid time off (PTO), vacation, health insurance, life insurance, disability insurance, and 401(k) benefits. They work an average of 53.5 hours of work per week with 11-hour days Monday through Thursday and a 9.5 hour day on Fridays.¹²

Like the Galloway quarry, the rural quarries are construction-driven and follow a construction pattern which is weather-driven to an extent resulting in slowdowns during the winter months from about December to April. None of the petitioned-for employees on the

¹⁰ Two other employees were hired as rural quarry crew employees for a short time – one was a no-call-no-show and thereafter terminated and one was a voluntary quit/termination. One other employee, as further described below, transferred from the Willard quarry to the rural quarries as a lead for about one month then transferred back to Willard as a sales loader.

¹¹ Patnode reports to HR and IT Director Randy Harwood. The record does not indicate their work locations.

¹² Payroll records of hours worked by rural quarry employees since hire show that to at least November 7, all of the petitioned-for employees worked 50 plus hours per week.

universal crew have been laid off or notified of layoff, or otherwise displaced at any time since their hire. To the contrary, the Employer intends for the petitioned-for employees to work as much as possible at the rural quarries unless they cannot work due to weather. In the last three months, the Employer has interviewed candidates for hire to its universal crew and extended a job offer to one candidate.¹³ Additionally, hiring for the universal crew remains a priority for the Employer going into the winter months and will be a top priority as Spring nears in March to April 2021.

C. Lead Employee Camrin Shoemaker

When the universal crew commenced operations at the Fair Play rural quarry in May, General Superintendent Tennis spent all of her time at Fair Play supervising the new employees. Brandon Smith, an experienced unit production employee from the Willard quarry transferred to Fair Play as a lead to help train new employees. Smith performed the same production/maintenance work as the universal crew employees. Under the direction of Tennis, Smith advised employees of the work plan for the day and oversaw day-to-day operations with Tennis. Smith also did some ordering of parts. In about June, Smith transferred back to the Willard quarry as a sales loader and about 30 days thereafter, universal crew employee Camrin Shoemaker replaced Smith as lead.

Shoemaker was hired onto the universal crew at Fair Play in May at \$17.00 per hour and, as noted, replaced Smith as lead in about July. In about November, he received a \$1.00 per hour raise as a lead. There is no separate job description for lead employee. Shoemaker does not possess any authority to hire or fire other employees and he has not been involved in any employee discipline matters. As a lead, Shoemaker spends 80 percent of his time performing the same production/maintenance work he performed before becoming a lead and performed by the other petitioned-for employees. For the remaining 20 percent of his time, Shoemaker performs lead duties which include advising employees of the work plan for the day and overseeing day-to-day operations with Tennis. Most job assignments are performed routinely by the petitioned-for employees who have been cross-trained to perform all quarry duties and do not require a great degree of direction. To a large extent, employee assignments are based on prior experience by the employee in the various primary skills (e.g., loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, or dozer/excavator/large equipment operator). As a lead, Shoemaker also decides which employees will cover for employees who are late or absent from work. Shoemaker also has some contact with customers and is currently being trained in parts ordering; he has done some limited ordering of parts such as screen cloths, conveyor belting, and idler rollers. He has also been trained to oversee periodic safety inspections by the MHSA and is responsible for ensuring that safety guidelines are being following by third-party contractors during blasting operations. In Tennis' absence, Shoemaker

¹³ The candidate did not respond to the offer and it was thereafter rescinded by the Employer due to lack of response.

is the highest-ranking employee on-site at the rural quarries. If any issues arise in Tennis' absence, Shoemaker contacts Tennis or upper management for further direction.

II. ANALYSIS

A. Board Law – Expanding Unit

Notwithstanding an employer's plan to expand its workforce, the Board will direct an immediate election when the current complement of employees is "substantial and representative" of the unit workforce to be employed in the near future. *Yellowstone International Mailing, Inc.*, 332 NLRB 386, 386 (2000); *Toto Industries (Atlanta), Inc.*, 323 NLRB 645, 645 (1997). In determining whether the employee complement is "representative and substantial" so as to warrant holding an immediate election, the Board in general finds that if approximately 30 percent of the eventual employee complement is employed and 50 percent of the eventual job classifications are filled, then the employee complement is substantial and representative and an election is appropriate. *Custom Deliveries, Inc.*, 315 NLRB 1018, 1019 fn. 8 (1994) (other citations omitted). In adopting these figures, the Board drew guidance from the standards enunciated for contract bar purposes in *General Extrusion Company, Inc.*, 121 NLRB 1165, 1167-1168 (1958). However, the Board has avoided the use of hard and fast rules in expanding unit determinations. *Clement-Blythe Companies*, 182 NLRB 502, 502-503 (1970). It considers the size of the employee complement at the time of the hearing, the nature of the industry, the time expected to elapse before a full, or substantially large, complement of employees is on hand, and other variables. *Id.* Thus, the Board will direct an election even when the *General Extrusion* formula has not been satisfied. See, e.g., *Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676, 1676-1677 (1968) (Board directed an election where employees were working in less than 50 percent of the planned job classifications).

The Board will only consider expansions that are to take place in the reasonably foreseeable future and not those that are indefinite, speculative or remote in time. In *Wittelman Steel Mills, Inc.*, 253 NLRB 320, 320 (1980), the Board found that the only reasonable projected expansion of the employer's operations against which to measure the substantiality of the present workforce were those expected to take place in the next four to five months. Any expansion beyond that depended on the purchase of new equipment and the erection of a new building and because the employer had not yet purchased the equipment or begun construction of the new building, the proposed expansion was considered too indefinite and speculative to use as a standard by which to measure the present complement of employees. *Id.* Likewise, in *Bekaert Steel Wire Corp.*, 189 NLRB 561, 562 (1971), the Board determined that 37 employees in four job classifications were clearly representative of the contemplated work force of 49-55 in the employer's present operation. The date of further expansion plans was uncertain and it would not effectuate the purposes of the Act to delay an election among employees in the existing operation solely because of the employer's planned addition of another production facility in the future. See also, *Gerlach Meat Company, Inc.*, 192 NLRB 559, 559 (1971).

B. Application of Board Law to the Facts – Expanding Unit

In light of the record evidence and applicable Board law, I find that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit.

At the time of the hearing, the Employer employed six employees in the petitioned-for unit who have worked at three rural quarries (Fair Play, Marshfield and Fair Grove) since the Employer acquired its eight rural quarries in January. The record evidence demonstrates that the Employer has no firm plans to activate operations at the five remaining rural quarries in the near future and has only taken some limited steps to activate two of those quarries (Buffalo and Stockton) which vaguely include engaging some vendors and procuring some purchase orders. The Employer has not entered into any lease agreements nor has it acquired necessary assets to commence operations at other quarries anytime soon. The Employer's best prediction is that it is hopeful to start activating operations at the Buffalo and Stockton rural quarries in about Summer 2021. No new job classifications are expected. The Employer anticipates that it will be necessary to build up to two universal crews of 10 employees each to run all eight quarries and that based on the progression of rural quarry operations to date, it will take at least one year to reach its first universal crew of 10 employees.

Initially, I note that the record evidence is not sufficient to show that Employer's anticipated expansion of its five remaining rural quarries will take place in the reasonably foreseeable future. By the Employer's own projections, further expansion to two additional rural quarries in Buffalo and Stockton is not expected to begin until at least Summer 2021, over six months from now. The predicted date of these expansions and hiring plans for the next phase of startup operations at Buffalo and Stockton is largely uncertain and speculative and it would not effectuate the purposes of the Act to delay an election among employees in the existing operation solely based on the Employer's *hope* to expand two additional rural quarries in Summer 2021 at the earliest and any remaining rural quarries at some unknown future date thereafter.

Next, I note that at the present time the current workforce occupies 100 percent of the classifications and comprises 60 percent of the size of the unit projected to exist in Summer 2021 at the earliest, which is more than six months from now. Even assuming the Employer were to expand its operations and reach its ultimate complement of 20 employees in the near future, which it acknowledges is not likely, the present complement of six employees would constitute 30 percent of the eventual total employee complement which would warrant an immediate election.

Noranda Aluminum, Inc., 186 NLRB 217 (1970), cited by the Employer, is distinguishable from this case. In that case, the Board primarily considered a community of interest issue between cable employees and other plant employees and found that "the requested unit [did] not possess a degree of functional distinctness and autonomy which would warrant a finding that the cable plant employees have a separate community of interest apart from the other employees and [could] not be represented as a separate appropriate unit." *Id.* at 218. With regard

to the Board's secondary finding that a representative number of employees had not yet been employed to warrant an immediate election, the Board noted that, unlike here, a representative number of classifications had likewise not been filled. *Id.* Likewise, the facts in *Some Industries, Incorporated*, 204 NLRB 1142 (1973), cited by the Employer, are significantly distinguishable. In that case, the pre-election hearing was held on March 14, 1973 and the record evidence therein demonstrated that while "[a]t the time of the hearing, the plant was engaged only in the production of plastic pipe and had four extrusion machines in operation...[t]he [e]mployer stated that it was *in the process of* expanding its operations by adding more equipment as well as new lines of products, thus necessitating the hiring of more employees and the filling of new job classifications." *Id.* at 1142. Importantly, the employer had ordered additional machinery which was expected to be operational by the end of March 1973 (the same month as the pre-election hearing) and would result in the hiring of six more employees. *Id.* The Board ultimately found that the present complement was not representative of that which would be employed in the near future as 10 to 15 new classifications would be added within the seven months following the hearing date. *Id.* at 1143. Such timing is not present here.

Accordingly, I find that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit to warrant an immediate election in this matter.

C. Board Law – Seasonal Unit

In determining whether an operation is seasonal, the Board examines whether the number of employees in the year-round complement is relatively substantial. *See, Sitka Sounds Seafoods, Inc.*, 325 NLRB 685, 686 (1998) (non-seasonal operation where a significant group of employees – 50 to 60 employees out of the 92 eligible voters – performed work through the year); *Saltwater, Inc.*, 324 NLRB 343, 344 (1997) (non-seasonal operation where employer employed 26 employee minimum during down months versus 85 employee maximum during peak months); *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1414 (1978) (seasonal construction operation where employer employed 60 employees during peak season and 25 employees during slack season); *Industrial Forestry Association*, 222 NLRB 295, 295 (1976) (seasonal operation where employer employed 33 employees in peak season and reduced to six employees in low season); *Mark Farmer Company, Inc.*, 184 NLRB 785, 785 (1970) (substantial complement found where doll manufacturer employed eight permanent employees and where hire of additional employees in advance of holiday sales was speculative); *Bordo Products Company*, 117 NLRB 313, 317 (1957) (seasonal operation where plant closed after peak season, and where employer employed 1,200 employees in peak and reduced to 107 employees in off season).

If the employer is engaged in virtually year-round production operations, the employer's operation may be deemed "cyclical" and an immediate election directed. *See, Saltwater Inc.*, 324 NLRB at 344 (seven peak months non-seasonal); *The Baugh Chemical Company*, 150 NLRB 1034, 1034 (1965) (10-month operations non-seasonal). In examining seasonality and the timing

of elections, the Board considers continued ties to employment for low-season and laid off employees. *Aspen Skiing Corporation*, 143 NLRB 707, 711 (1963) (Board did not delay election to peak season where 14 of 50 employees employed during summer low season, all of whom had come from the winter, peak-season crew).

D. Application of Board Law to the Facts – Seasonal Unit

In light of the record evidence and applicable Board law, I find that the Employer's operation is not seasonal in nature.

Most importantly, the Employer has not established any fluctuation in the substantial complement of employees year-round. While I recognize that there is a peak season for the rural quarries from April through November¹⁴ which follows a construction pattern, this is a nine-month period which weighs in favor of concluding that the operations are cyclical, rather than seasonal, in nature. The same type of cyclical operations exist at the Galloway quarry. Moreover, although the petition herein has been filed during the Employer's slower season, none of the petitioned-for employees have been laid off or notified that they will be laid off, or otherwise displaced at any time since their hire. To the contrary, the Employer intends for the petitioned-for employees to work as much as possible at the rural quarries unless they cannot work due to weather. To this end, in the last three months, the Employer has interviewed candidates for hire for the universal crew and extended a job offer to one candidate. The Employer acknowledges that hiring for the universal crew remains a priority going into the winter months and will be a top priority as Spring nears in March to April 2021. This undercuts the Employer's argument that its rural quarry operations are seasonal.¹⁵

Accordingly, I find that the record evidence is not sufficient to show that the Employer does not employ a substantial complement of employees in the petitioned-for unit throughout the entire year to support the Employer's position that the rural quarry operations are seasonal in nature such that an election in this matter should be delayed.

E. Board Law – Supervisory Issue

Section 2(11) of the Act defines a supervisor as:

¹⁴ The Employer argues that the election should be delayed to May 2021 when a substantial complement of employees would be present in the proposed unit.

¹⁵ In contrast, as acknowledged by the Employer in its brief, in finding the employer's operations to be seasonal in *Dick Kelchner Excavating*, 236 NLRB at 1416, the Board determined that "[t]he exact date for the resumption of the [e]mployer's normal operations [could] not be determined on [the record therein]." Likewise, the Board found in *The Cleveland Cliffs Iron Company*, 117 NLRB 668,670 (1957), also cited by the Employer, that "the exact date for resumption of the normal operation" of the seasonal employer's vessels could not be determined. Such is not the case here.

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. See, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)'s definition is read in the disjunctive, and thus, the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. See, *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Since supervisors are excluded from the Act's protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048.

To meet this standard, the party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of such power are insufficient. See, *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. See, *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

F. Application of Board to the Facts – Supervisory Issue

There is no claim or record evidence that the lead employee Shoemaker possesses authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, adjust grievances of, or discipline other employees. Rather, the Employer asserts that Shoemaker is a statutory supervisor based on his authority to assign work to and responsibly direct other employees, and other secondary indicia of supervisory status.

1. Assignment of Work

The Board in *Oakwood* defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” *Id.* at 692. The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.* The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Id.* (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

Regarding the element of place, there is no record evidence about Shoemaker assigning employees to specific areas. While there is some record evidence that assignments are based on prior experience such that an employee may be assigned to a particular place, the record does not show that Shoemaker makes such determinations. The record demonstrates that all of the petitioned-for employees have been cross-trained to equally perform all quarry duties and does not disclose assignments by the leads with respect to place which requires them to use judgment involving a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood*. *Id.*

As to the element of time, the record is absent of any evidence regarding who is in charge of scheduling matters at the rural quarries. There is no record evidence or claim that Shoemaker is involved in or has any authority regarding the scheduling or schedule changes of any employees. The Employer has not established any exercise of supervisory authority regarding the scheduling of other employees. See, *Golden Crest*, 348 NLRB at 728-730 (2006). Thus, the record does not support that Shoemaker appoints employees to a time as contemplated in *Oakwood*.

With respect to the element of duties, the Employer argues that Shoemaker uses independent judgment in assigning and directing the duties and tasks of the petitioned-for employees. As noted, all of the petitioned-for employees have been cross-trained to equally perform all quarry duties. While there is some record evidence that assignments are based on prior experience by the employee in the various primary rural quarry skills (e.g., loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, or dozer/excavator/large equipment operator), the record does not show that Shoemaker makes such determinations. Although Shoemaker may advise employees of the work plan for the day, there is no record evidence demonstrating that he performs any detailed analysis with a degree of independence necessary to constitute independent judgment of the employees' abilities in relation to production/maintenance needs.

The Employer also argues that Shoemaker "uses independent judgment to redirect employees to meet customer needs." In this regard, it points to Shoemaker's interfacing with customers regarding product inventory resulting in alterations and adjustments to the production schedule and the employees' assignments. I find such evidence is tenuous and conclusory and does not confer any supervisory authority. The record overall demonstrates that all of these employees' assignments are routine in nature and based on their title, rather than any particular expertise, and the evidence is insufficient to establish that the direction provided to them by Shoemaker requires the use of independent judgment or involves a "degree of discretion that rises above routine or clerical." *Oakwood*, 348 NLRB at 693.¹⁶

2. Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, *and* that there is a "prospect of adverse consequences" for others' deficiencies. *Community Education Centers, Inc.*, 360 NLRB 85-86 (2014); *Oakwood*, 348 NLRB at 691-692, 695.

The record evidence establishes that Shoemaker is in charge of day-to-day direction of the petitioned-for employees especially when General Superintendent Tennis is absent. In this

¹⁶ I further find that Shoemaker's limited authority to order parts does not appear to involve any significant exercise of independent judgment of the type involved in assessing supervisory status, and moreover, this function is not included in the enumerated list of supervisory indicia found in Section 2(11).

regard, Shoemaker ensures that quarry rules and standards are being followed. However, the record is absent of any evidence showing that Shoemaker provides feedback to Tennis or upper management regarding the deficient performance of other employees. The Employer has not established that Shoemaker is *accountable* for his actions in directing the petitioned-for employees. In this regard, the record is absent of any evidence showing that Shoemaker has suffered any adverse consequences such as discipline concerning the deficient performance of any employees. Additionally, there is no evidence that General Superintendent Tennis or anyone else in management has advised Shoemaker he will or even may be subject to consequences himself concerning deficiencies and errors of other employees.¹⁷ In sum, the overall record does not demonstrate that the Employer has *actually* held Shoemaker accountable or has imparted clear and formal notice to him that he will be held accountable for the job performance of any employees. See, *Golden Crest*, supra at 731. Thus, I find that the Employer has not met its burden to establish that Shoemaker responsibly directs employees as contemplated by *Oakwood*.¹⁸

3. *Other Secondary Indicia*

While the Board has held that secondary indicia can be a factor in establishing supervisory status, it is well established that where putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest*, 348 NLRB at 730, fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

There is no record evidence that Shoemaker participates in any evaluation procedures for employees or that any feedback provided by him about employees is incorporated into any employee performance reviews. Shoemaker does not participate in any management meetings. The limited record evidence regarding Shoemaker's involvement in training employees in rural quarry operations does not support supervisory authority. The Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, *The Washington Post Co.*, 242 NLRB 1079, 1083 fn. 15 (1979) (citing *House of Mosaics*, 215 NLRB 704, 712 (1974) ("having the responsibility of training new employees does not invest employees with supervisory authority within the meaning of the Act.")). I also note that

¹⁷ At the hearing, the Employer presented some evidence regarding an incident at the Fair Play quarry which took place in about June to July when the lead position was vacant, and Tennis was exclusively supervising employees at Fair Play. A production employee was refusing to perform digging work with other production employees and Tennis directed the employee to perform the work. The employee walked off job and did not return to the job site. Although no similar situation has occurred since Shoemaker has become the lead, the Employer argues this will be within Shoemaker's responsibilities and constitutes supervisory authority. Not only is such evidence speculative and conclusory (the record does not indicate that the employee who walked off the job was disciplined, suspended or terminated by anyone), it does not demonstrate that Shoemaker possesses any supervisory authority within the meaning of Section 2(11).

¹⁸ The Employer's argument that it anticipates that as it expands to opening the other rural quarries and the universal crew grows, it may be necessary to have a second lead and that within one to two years, Shoemaker may be performing supervisory duties exclusively, is speculative and conclusory.

although there are times when Shoemaker is the highest-ranking official on quarry premises, if any issues arise in Tennis' absence, Shoemaker contacts Tennis or upper management for further direction. At any rate, the Board has continually found that highest rank is a secondary indicium which does not confer 2(11) status where, as here, the putative supervisor is not shown to possess any of the primary indicia of supervisory status. *Golden Crest*, 348 NLRB at 730 fn. 10; *Training School at Vineland*, 332 NLRB at 1412.¹⁹

The Employer's reliance on *Alliance Sand Company*, 107 NLRB 1273 (1954) and *United States Gypsum Company*, 116 NLRB 638 (1956) is misplaced and the facts therein are distinguishable from this case. In *Alliance Sand*, the Board found that an assistant superintendent at a sand quarry was a statutory supervisor primarily based on that fact that he was above shift foremen who were determined to be statutory supervisors based on their authority to hire and discharge and/or effectively to recommend such action. *Id.* at 1275. Additionally, the assistant superintendent therein had involvement in effectively recommending hiring as well as the discipline of other employees. *Id.* In *United States Gypsum*, the Board found that head mechanics were statutory supervisors based on their authority to "recommend changes in the status of crew members." *Id.* at 642. Additionally, the head mechanics spent "approximately half their time in overseeing their crews' work," were "regarded as supervisors by the employees working under them," and did not report to the same management individual as the other employees. *Id.* In contrast, the record herein demonstrates that Shoemaker spends 80 percent of his time performing the same production/maintenance work he performed before becoming a lead and performed by the other petitioned-for employees and 20 percent of his time performing lead duties.²⁰

Accordingly, I find that the record evidence is insufficient to establish Shoemaker is a supervisor within the meaning of Section 2(11) of the Act and thus he is eligible to vote in the election.

III. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. The Parties' Positions

Petitioner asserts that a mail ballot election should be held given the current state of the COVID-19 pandemic in Missouri and particularly Polk County where the Employer proposes a

¹⁹ Most recently, in *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 3 (2015), the Board reiterated that "nothing in the statutory definition of 'supervisor' implies that the service as the highest ranking employee on site requires finding that the employee must be a statutory supervisor." (other citations omitted).

²⁰ The Employer's argument in its brief that Shoemaker's ratio of production/maintenance time to lead/supervisory time "is projected to now 'flip'" is speculative and conclusory as exemplified by the Employer's own witness, General Superintendent Tennis, who testified: "Eventually it should flip...it is going to be a gradual flip, depending on how many people we get hired, and you know, the speed of it. So [Shoemaker] will slowly go to seventy, sixty [percent], you know, and in a year or two years, it could be all supervision."

manual election would be held.²¹ In this regard, Petitioner primarily contends that the second factor cited by the Board in *Aspirus*, related to the 14-day testing positivity rate in Polk county, as well as in other counties where the employees may regularly interact, is easily satisfied in this case. Petitioner references data at the time of its brief filing from the U.S. Centers for Disease Control and Prevention (CDC) showing a 6.14 percent positivity rate in Polk County.²² Petitioner additionally contends that a mail ballot election is appropriate in this case given Missouri Governor Mike Parson's non-mandatory health warnings related to group gatherings. Finally, Petitioner points to record testimony referencing that some petitioned-for employees recently tested positive for COVID-19.

Despite being advised at the hearing that election arrangements should be addressed via brief per the requirements of *Aspirus* and the data websites referenced therein, other than reiterating the Board's decision in *Aspirus*, the Employer does not make any specific arguments or provide any data in favor of holding a manual election in this case. The Employer merely asserts in a conclusory manner that I should "follow the Board's reaffirmed 'general rule' that elections 'be conducted manually.'" Without stating how it will do so (e.g., by providing a large sanitized and disinfected voting area capable of social distancing and separate entrance and exit; requiring mask-wearing by all election participants; providing hand sanitizer, masks, plexiglass shields, and other PPE to voters and election participants; limiting number of attendees at pre-election conference and ballot count as well as number of election observers; etc.), the Employer merely claims that the *Aspirus* guidelines "clearly can be met in this case." The Employer does not address any state or local health orders or affirm that any proposed manual election sites could be established in a way that avoids violating them relating to maximum gathering size. The only specific factor acknowledged by the Employer is that it agrees to abide by the GC Memo 20-10 protocols. While specifically acknowledging that the Board's guidelines in *Aspirus* require certification, by affidavit, of the current COVID-19 status at its relevant facilities, the Employer provides no such certification by affidavit. The Employer does not address whether there is a current COVID-19 outbreak at its facilities nor does it affirmatively declare an absence of individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). Moreover, the Employer does not acknowledge recent increases in the number of new COVID-19 positive tests in the nation, state and/or counties, or provide data either on the 14-day trend in the number of new confirmed cases of COVID-19 or the 14-day testing positivity rates in counties where facilities are located.

²¹ Petitioner notes that "it would be irrelevant and a waste of Board resources to conduct an analysis of the relative risk at all eight quarry locations because the Employer has not presented any evidence that any of the unit employees will be working at any of those other quarries immediately preceding an election and because the Employer's Statement of Position only identifies the Fair Play [quarry in Polk County]." As discussed above, three of eight rural quarries (Fair Play, Marshfield and Fair Grove) are currently active and operational.

²² Without providing data results, Petitioner also recommends accessing the Georgia Tech "COVID-19 Event Risk Assessment Planning Tool" (<https://covid19risk.biosci.gatech.edu/>) for additional data for Polk County or other counties in Missouri.

B. Applicable Framework When Considering a Mail Ballot Election

The Board has delegated its discretion in determining election arrangements to Regional Directors. *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). In *Aspirus*, the Board reiterated its longstanding preference for manual elections under *San Diego Gas* while also providing more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of COVID-19. The Board set forth “six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic,” noting that “[w]hen one or more of these situations is present, a Regional Director should consider directing a mail ballot election” under the extraordinary circumstances presented by the COVID-19 pandemic. *Aspirus*, 370 NLRB slip op. at 1. Those six situations are:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by the GC Memo 20-10²³ protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
6. Other similarly compelling considerations.

Accordingly, I analyze the instant petition using the prevailing circumstances in the state and county where the facilities are located and in light of the Board’s recent guidance in *Aspirus*.

C. A Mail Ballot Election Is Appropriate

In assessing the six situations, I find that the Employer has failed to provide appropriate assurances under the fifth situation and that moreover, the second situation—COVID testing rates in the immediate area—mandates that I order a mail ballot election. The first situation is not grounds for a mail ballot election as Region 14’s offices are not subject to mandatory telework status. The fourth situation is also not grounds for a mail ballot election as the Employer has affirmed its commitment to following GC Memo 20-10 protocols, albeit without any detail as

²³ See also, GC Memo 21-01 stating “[a]side from elements set forth in GC Memo 20-10, upon which the *Aspirus Keweenaw* Board relies in part, the instructions set forth in this memorandum supersede all other instructions on the subject.”

noted. Under the third situation, I find that the proposed manual election site could be established consistent with local guidelines. Below, I shall discuss my assessment of the third, fifth, and second situations in connection with the Fair Play, Marshfield and Fair Grove rural quarries located in Polk County, Webster County and Greene County²⁴, respectively.²⁵

With regard to the third situation, whether the proposed manual election site can be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size, on November 19, 2020, Governor Parson issued Executive Order 20-19 extending state's public health emergency to March 31, 2021."²⁶ On the same date, Governor Parson issued a statewide "Public Health Warning" advising that the state would take a "balanced approach" to Missouri's COVID-19 response and setting forth advisories for personal behavior, business, travel, and local government. These advisories make specific recommendations with regard to mask-wearing; social distancing; handwashing; limiting large gathering interactions and travel outside the state; staying home when sick; and modifying physical workspaces and developing disease response plans in workplaces. The state recommends that all residents wear a cloth face covering when in a public setting where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission.²⁷ The COVID-response state policies give leeway to counties and cities to put in place stricter restrictions against the virus. The Polk County Health Center²⁸ recently issued a public advisory due to the current positivity rate and red zone²⁹ status in Polk County. The advisory states that Polk County residents are "expected to wear a mask and practice physical distancing when with those outside their household" and are "strongly encouraged to stay home and limit gatherings to close contacts only during the holiday season."³⁰ The Webster County Health Unit maintains an updated list of "community exposures" and advises county residents "to be mindful of keeping the social distance of at least 6 ft, wear a mask if you're going to be out in public, use good hand hygiene and hand sanitizer, and if you're sick, please stay home."³¹ Effective November 23, Marshfield Mayor Natalie McNish implemented Executive Order 2020-06 with a citywide requirement for

²⁴ At the hearing, the Employer erroneously referenced Fair Grove as being in Dallas County.

²⁵ While the Employer proposes the Fair Play rural quarry as the manual election site, as discussed above, the Marshfield and Fair Grove rural quarries are also active and operational and could be viable election sites as well. Therefore, my analysis will address these three communities.

²⁶ "Governor Parson Signs Executive Order 20-19 Extending State of Emergency in Missouri."
<https://governor.mo.gov/press-releases/archive/governor-parson-signs-executive-order-20-19-extending-state-emergency>. To view Executive Order 20-19, [click here](#). (accessed December 14).

²⁷ <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/statewide-orders.php> (accessed December 14)

²⁸ A governing body "to protect and promote the health and safety of the people in Polk County by responding appropriately to identified public health needs."

²⁹ The White House Coronavirus Task Force gives a red zone designation to states with positivity rates above 10 percent, or with more than 100 new weekly cases per every 100,000 people, as further discussed below.

³⁰ <https://polkcountyhealthcenter.org/> (accessed December 14).

³¹ <http://webstercohealth.com/COVID-19/> (accessed December 14).

face coverings in public places.³² Greene County's June 12 COVID-19 Resolution "strongly recommend[s] that all citizens follow and adhere to health guidelines published by the Center for Disease Control and Prevention pertaining to the novel coronavirus outbreak known as COVID-19 and take personal responsibility upon themselves for their own health, well-being and protection and for the same of those they may come into contact with" and "offer[s] a sampling of ... measures citizens are encouraged to take for their protection" including recommendations for handwashing and surface disinfecting measures; social distancing; avoiding large gatherings; and considering wearing a mask, or in the alternative, covering coughs and sneezes.³³ Although Greene County does not have any enforceable restrictions, the City of Springfield-Greene County Health Department has had a face covering ordinance that effective from July 16 through January 9, 2021. The ordinance requires face coverings in public places inside the Springfield city limits.³⁴

With regard to the fifth situation and the current COVID-19 status at the Employer's facility, in *Aspirus*, the Board stated:

...for the duration of the pandemic, we require that in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). The Employer must also supplement its initial submission and certify any changes to the facility's COVID-19 status after a manual election is directed, up to the day of the election itself. Based on these certifications, the determination that there is a COVID-19 outbreak at the employer's facility or the employer's failure or refusal to provide the required certifications will ordinarily indicate the propriety of a mail ballot election. 370 NLRB slip op. at 7

The Employer does not address whether there is a current COVID-19 outbreak at its facilities. The Employer does not affirmatively declare an absence of individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). While the Employer agrees that it would abide by GC 20-10 as noted, which includes certifying any changes to its facility's COVID-19 status after a manual election is directed, up to the day of the election itself, I note that it has not met the requirements of the fifth factor in *Aspirus*.

I am left to analyze the second situation described by the Board in *Aspirus*, that is, whether either the 14-day trend in the number of new confirmed cases of COVID-19 in Polk, Webster and

³² <http://www.marshfieldmo.gov/news-events/mayor-s-blog/item/207-executive-order-2020-06-face-coverings-in-public-places> (accessed December 14). See, [Executive Order 2020-06 - Signed 1.pdf](#).

³³ <https://www.greenecountymmo.gov/> (accessed December 14).

³⁴ <https://www.springfieldmo.gov/5244/Masking-Ordinance-and-Phase-3A-3B-FAQs> (accessed December 14).

Greene Counties where the facilities are located is increasing, or the 14-day testing positivity rate in counties is five percent or higher. In *Aspirus*, the Board indicated that county-level data for the potential manual polling place should be accessed through Johns Hopkins University. 370 NLRB slip op. at 5, fn. 22.

According to its “COVID-19 Status Report” for Polk County, Johns Hopkins data shows the 14-day trend in the number of new confirmed cases at 11 cases on December 1 and at 6 cases on December 14, with a daily high within that range of 37 on December 5.³⁵ Data contained in the Johns Hopkins COVID-19 Status Report for Webster County shows the 14-day trend in the number of new confirmed cases at 32 cases on December 1 and at 17 cases on December 14, with a daily high within that range of 57 on December 5.³⁶ Data contained in the Johns Hopkins COVID-19 Status Report for Greene County shows the 14-day trend in the number of new confirmed cases at 246 cases on December 1 and at 110 cases on December 14, with a daily high within that range of 454 on December 13.³⁷

Number of Cases in Last 14 Days—Polk County	
-14 (12/1/20)	11
-13	9
-12	18
-11	14
-10	37
-9	36
-8	11
-7	9
-6	23
-5	15
-4	26
-3	0
-2	25
-1 (12/14/20)	6

Number of Cases in Last 14 Days—Webster County	
-14 (12/1/20)	32
-13	-1
-12	-1
-11	5
-10	57
-9	22
-8	15
-7	19
-6	21
-5	18
-4	20
-3	0
-2	43
-1 (12/14/20)	17

Number of Cases in Last 14 Days—Greene County	
-14 (12/1/20)	246
-13	95
-12	151
-11	132
-10	179
-9	214
-8	203
-7	134
-6	188
-5	157
-4	123
-3	0
-2	454
-1 (12/14/20)	110

These numbers show a 14-day trend of new confirmed cases in Polk, Webster and Greene Counties remaining overall steady and in a significantly high range for those counties. This situation, standing alone, while not showing an outright upward trajectory, is concerning and supports the propriety of a mail ballot election.

³⁵ <https://bao.arcgis.com/covid-19/jhu/county/29167.html> (accessed December 14).

³⁶ <https://bao.arcgis.com/covid-19/jhu/county/29225.html> (accessed December 14).

³⁷ <https://bao.arcgis.com/covid-19/jhu/county/29077.html> (accessed December 14).

As further noted by the Board in *Aspirus* with regard to the second factor, the 14-day “percent positive” or “testing positivity rate” statistic is “based on the number of positive and total tests in the locality” and is “suggestive of transmission rates in the locality among people who have not been tested.” 370 NLRB slip op. at 5. Johns Hopkins University notes that “[b]ecause a high percentage of positive tests suggests high coronavirus infection rates (due to high transmission in the community), a high percent positive can indicate it may be a good time to add restrictions to slow the spread of disease.”³⁸

On May 12, 2020 the World Health Organization (WHO) advised governments that before reopening, testing positivity rates should remain at five percent or lower for at least 14 days,³⁹ and the Board has decided to use this five percent standard in analyzing the appropriateness of a mail ballot versus manual election. State-by-state statistics for 14-day testing positivity rates reported by Johns Hopkins (“Which U.S. States Meet WHO Recommended Testing Criteria?”) show that as of December 14, Missouri has a higher than recommended positivity rate of 16.54 percent.⁴⁰ While Johns Hopkins reports county-level statistics for 14-day trends in the number of new confirmed cases, as noted above, it does not report statistics for 14-day testing positivity rates on a county-by-county basis. However, the State of Missouri reports seven-day positivity rates county-by-county as calculated by the Whitehouse Coronavirus task force.⁴¹ These statistics show that for the reporting period of December 5 to December 11, the seven-day positivity rates for Polk County,⁴² Webster County,⁴³ and Greene County⁴⁴ were 10.1 percent, 18.9 percent and 19.9 percent, respectively.

The above statistics showing the 14-day trend in the number of new confirmed cases and the testing positivity rates above five percent are sufficient to meet the second situation enunciated by the Board in *Aspirus* and establish that there is current evidence of widespread COVID-19 infection in the communities surrounding the Employer’s facility with no expected improvement in COVID conditions, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

Given the above conditions, I find the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of further infection and the risk of unnecessarily exposing employees, Board agents, party representatives,

³⁸ <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html>.

³⁹ <https://coronavirus.jhu.edu/testing/testing-positivity> (accessed December 14).

⁴⁰ <https://coronavirus.jhu.edu/testing/testing-positivity> (accessed December 14).

⁴¹ The State of Missouri notes with that each county positivity rate “reflects the total number of positive PCR tests in the past 7 days, divided by the total number of PCR tests in the past 7 days” – this is the same method used by the CDC. A PCR test is a nasal swab molecular diagnostic test that detects the virus’s genetic material versus an antigen/rapid diagnostic tests that detects specific proteins from the virus – see, <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics> (accessed December 14).

⁴² <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

⁴³ <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

⁴⁴ <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

and their families to COVID-19, and it will ensure that the unit employees have the opportunity to vote promptly.

Based on the above, a mail ballot election is warranted at this time.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.⁴⁵
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit⁴⁶ appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Included: All full-time and regular part-time, hourly-paid Equipment Mover and Operator (Haul Truck, Loader, Mechanic, Plant, Quality Control, Rolling Stock Equipment (Dozer, Excavator, etc.), Quarry Maintenance, and Water Truck) employees employed by the Employer at its rural quarries currently located in Bolivar, Buffalo, Fair Grove, Fair Play, Conway (Marshfield), Milo (Montevallo), Pittsburg, and Stockton, Missouri.

Excluded: All other employees, temporary employees, Inside Sales Support, Scale Clerk/Operators, Sales Loaders, other sales employees, dispatchers, office

⁴⁵ The parties stipulated that the Employer is a State of Missouri corporation engaged in the business of producing construction aggregate from its headquarters located at 431 South Jefferson, Suite 250, P.O. Box 50685, Springfield, Missouri, with quarry facilities located at various locations in Missouri. During the past year, a representative period, the Employer, in the course and conduct of its business operations, purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Missouri. During that same period, the Employer sold and shipped goods and services valued in excess of \$50,000 directly to customers located outside the State of Missouri. The Employer annually derives gross annual revenues in excess of \$500,000.

⁴⁶ The parties stipulated to the inclusions and exclusions to the unit during the hearing. The unit description below is in accord with the stipulation but the language was modified to more closely conform to language generally used to describe bargaining unit.

clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Heavy Construction Laborers' Local #663, affiliated with Laborers' International Union of North America.**

A. ELECTION DETAILS

I have determined that the election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, December 28, 2020**, by personnel of the National Labor Relations Board, Region 14, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, January 4, 2021**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at (913) 275-6525.

The ballots will be commingled and counted by the Subregion 17 office at 2:00 p.m. on **Tuesday, January 19, 2021**. In order to be valid and counted, the returned ballots must be received by the Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be held by videoconference. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the weekly payroll period ending December 19, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as directed above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. VOTER LIST

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, December 17, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. POSTING OF NOTICES OF ELECTION

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Conco Quarries, Inc.
Case 14-RC-267769

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at St. Louis, Missouri, this 15th day of December 2020



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14/Subregion 17
8600 Farley Street, Suite 100
Overland Park, Kansas 66212-4677